United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
	)	
and	)	**Docket No. 13-323**
	)	**Issued: May 10, 2013**
U.S. POSTAL SERVICE, POST OFFICE,	)	
Bellmawr, NJ, Employer	)	
	)	

Appearances: *Case Submitted on the Record*
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 26, 2012 appellant, through her attorney, filed a timely appeal of an August 16, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the date of OWCP's last merit decision on September 8, 2011, to the filing of this appeal on November 26, 2012, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal counsel contends that appellant is entitled to a merit review as he submitted a December 9, 2011 report from Dr. Arthur Becan, an orthopedic surgeon, which constitutes relevant and pertinent new evidence not previously considered by OWCP.

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[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that appellant, then a 41-year-old letter carrier, sustained a left knee contusion and lateral meniscus tear in the performance of duty on September 19, 2009. It paid her appropriate wage-loss and medical compensation benefits.

By decision dated February 9, 2011, OWCP terminated appellant's wage-loss benefits effective that same day.

By decision dated March 23, 2011, OWCP terminated appellant's medical benefits effective that same day.

On March 28, 2011 appellant, through her attorney, requested a hearing which was held before an OWCP hearing representative on June 22, 2011.

By decision dated September 8, 2011, OWCP's hearing representative affirmed the February 9 and March 23, 2011 termination decisions on the basis that the evidence of record failed to establish that appellant continued to suffer injury-related residuals. Thus, the hearing representative determined that appellant was not entitled to compensation.

On May 22, 2012 appellant, through her attorney, requested reconsideration and submitted a report from Dr. Becan dated December 9, 2011 who reviewed appellant's medical records and history, conducted a physical examination and determined that appellant had a three percent permanent impairment of the left lower extremity. She also filed a claim for a schedule award.

By decision dated August 16, 2012, OWCP denied appellant's request for reconsideration of the merits finding that she did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.[2] OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[3]

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and

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[2] *Id*. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[3] *See Annette Louise*, 54 ECAB 783, 789-90 (2003).

pertinent new evidence not previously considered by OWCP.[4] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[5] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[6]

ANALYSIS

In support of her May 22, 2012 reconsideration request, appellant submitted a new medical report dated December 9, 2011 from Dr. Becan who reviewed appellant's medical records and history, conducted a physical examination and determined that appellant had a three percent permanent impairment of the left lower extremity. Dr. Becan's opinion directly addressed the grounds upon which OWCP denied appellant's claim as it addressed the issue of whether appellant continued to have disabling residuals due to her accepted employment injuries. For these reasons, the Board finds that Dr. Becan's December 9, 2011 report constituted relevant and pertinent new evidence not previously considered by OWCP. As it meets one of the standards for obtaining a merit review of his case, the Board finds that OWCP improperly denied appellant's request. Appellant is entitled to a merit review.

The Board will remand the case for a merit review. After such further development of the evidence as might be necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP failed to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

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[4] 20 C.F.R. § 10.606(b)(2). *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

[5] 20 C.F.R. § 10.607(a).

[6] *Id*. at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2012 decision of the Office of Workers' Compensation Programs is remanded to OWCP for further action consistent with this decision of the Board.

Issued: May 10, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board